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CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Natural Answers, Incorporated

Serial No. 75/865,497

Daniel S. Polley of Malin, Haley & DiMaggio for Natural Answers, Incorporated.

Brian D. Brown, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Simms, Walters and Rogers, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Natural Answers, Incorporated has filed a trademark application to register the mark HERBAL OCTANE for "dietary supplement."[1]

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark HERBA FUEL, previously registered for

[1] Serial No. 75/865,497, in International Class 5, filed December 20, 1999, based on an allegation of a bona fide intention to use the mark in commerce.

"dietary supplement,"[2] that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We reverse the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Considering the goods or services involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or

[2] Registration No. 1,487,374 issued May 10, 1988, to Twin Laboratories, Inc., in International Class 5.

services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). *See also, Octocom Systems, Inc. v. Houston Computer Services, Inc.,* 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). In this case, the goods, as identified, are identical.

We turn, next, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co*., 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered

in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The Examining Attorney submitted dictionary definitions of "octane" as "any of various isomeric paraffin hydrocarbons … found in petroleum and used as a fuel and solvent," and "an octane number" and of "fuel" as "something consumed to produce energy."[3] He contends that the marks are confusingly similar because "'octane' and 'fuel' share comparable meanings and can be used interchangeably"; and both marks begin with terms that are "exceedingly similar in spelling, sound and appearance (HERBAL and HERBA)."

Applicant contends that the terms "octane" and "fuel" are different visually, aurally and in connotation. Regarding connotation, applicant argues that "octane" refers to the quality of gasoline, not to the fuel itself, and that "[e]quating 'octane' to 'fuel' is similar to equating 'proof' and 'alcohol.'" Applicant submitted

[3] *The American Heritage Dictionary of the English Language* (3rd ed. 1992).

copies of third party registrations for the marks HERBAL DRIVE and HERBAL BLAST for similar goods and argues that all of these marks are extremely weak.

We agree with applicant's analysis of the marks involved in this case. Both applicant's and registrant's goods are broadly identified as dietary supplements, which includes herbal supplements. Thus, the term "herbal" in applicant's mark is merely descriptive; and the term "herba" in registrant's mark closely suggests the merely descriptive term "herbal." Regarding the terms "octane" and "fuel," while their dictionary definitions show them to be somewhat related terms, those definitions also show that, as applicant argues, the terms have different connotations. Octane refers, more specifically, to the content or quality of fuel. However, both terms connote, in the context of these goods, that the goods give energy to users and, as such are also highly suggestive of those goods. Thus, both marks, consisting of a merely descriptive term followed by a highly suggestive term, are weak marks. While we agree that weak marks are entitled to protection, we find the differences between these weak marks sufficient to avoid any likelihood of confusion.

We conclude that confusion is not likely between applicant's mark, HERBAL-OCTANE, and registrant's mark, HERBA FUEL, as used in connection with dietary supplements.

Decision: The refusal under Section 2(d) of the Act is reversed.